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April 7,2003

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Marlene H. Dortch Secretary Federal Communications Commission 445 Twelfth Street S.W. Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Applications for Transfer of Control of Hispanic Broadcasting Corp., and Certain Subsidiaries, Licensees of KGBT(AM), Harlingen, Texas et al. (Docket No. MB 02-235, FCC File Nos. BTC-20020723 ABL *et al.*)

Dear Ms. Dortch:

On behalf of the National Hispanic Policy Institute, Incorporated ("NHPI") and Spanish Broadcasting System, Inc., ("SBS") there is jointly transmitted herewith further information regarding the above-referenced proposed merger between Univision Communications, Inc. ("Univision") and Hispanic Broadcasting Corp. ("HBC"). NHPI has filed a Petition to Deny the proposed merger. NHPI and SBS have brought significant amounts of information to the Commission's attention through <u>ex parte</u> presentations pursuant to the Commission's Public Notice, released August 26,2002 (DA 02-2082). NHPI hereby incorporates by reference the <u>ex parte</u> materials provided by SBS.

This filing provides new and recently obtained documentation which addresses several basic questions that the Commission should consider before it acts on the proposed merger. NHPI and SBS believe that substantial questions of fact have been raised about the parties to the merger which cry out for a full evidentiary hearing on appropriate specified issues. The following materials show:

1. The Hispanic media market is distinct from the general media market in terms of all the relevant characteristics, including costs, advertisers' needs, and consumer preferences. Annexed hereto as Exhibit 1 is an expert analysis prepared by Evan S. Schouten, an economist at Charles River Associates, who identifies that: (a) Hispanics are an important demographic; (h) advertisers seeking to reach Hispanic audiences do so on Hispanic media; (c) general media is not as effective as Hispanic media in reaching Hispanic audiences, because general media does not

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reach or persuade Hispanics as effectively or cheaply as Hispanic media; and (d) businesses structure themselves differently (in budgets, use of separate sales representations, *etc.*) for Hispanic advertising than for general advertising. This analysis should be reviewed in the light of Univision's own sales materials which prove beyond doubt that Hispanic radio and television constitute a single, distinct market. Exhibit 2. The relevance of this material cannot be overstated: Univision, itself, considers the Hispanic television and radio market as a separate audience and advertising universe.

2. Clear Channel Communications, Inc. ("Clear Channel") has violated the Commission's attribution rules. Annexed hereto as Exhibit 3 is an expurgated and annotated version of the proposed Second Amended Complaint in SBS's litigation with Clear Channel and HBC that includes those sections not derived from testimony or documents designated confidential by Defendants in that action.' The annotations are referenced to the deposition testimony of Clear Channel's CEO and CFO, and HBC's CFO, and exhibits on which those sections are based, and the reference testimony and exhibits are located behind the indicated tabs. A number of the documents are now no longer confidential and only became available within the last thirty days. Hence, for the first time documents are submitted to the Commission to confirm arguments made previously that Clear Channel influences HBC to such an extent that ownership of Clear Channel and HBC stations in various markets triggers the Commission's attribution rules, and that Clear Channel and HBC have attempted to deny to competitors access to capital.

New document and deposition evidence shows that Clear Channel is anything but a passive investor because it has actively participated in HBC's management and operation and has exerted a profound influence, indeed control, over HBC's corporate affairs. For example, Clear Channel has actively participated in the negotiations of proposed radio station purchases for HBC. Additional evidence indicates that at least two of HBC's directors are controlled by Clear Channel.

Included within the documents are alarming materials that show the extent to which Clear Channel has gone to misrepresent to the Commission that it is a passive HBC investor. For instance, a review of the documents in Exhibit 3 at

Suanish Broadcasting System, Inc. v Clear Channel Communications. Inc. and Hispanic Broadcasting Corporation. The Court dismissed the lawsuit on January 31,2003. A motion for reconsideration is pending. However, allegations of undue and significant influence relative to the documents now submitted were never rebutted by either Clear Channel or HBC.

Tab 24 shows that Clear Channel blatantly influenced HBC with regard to internal financial matters. On April 3,2002, shortly before Univision and HBC agreed to the merger now pending at the Commission, Mac Tichenor, Jr., HBC's CEO, faxed a memo to Randall Mays, Clear Channel's CFO, attaching Tichenor's "rough" draft in advance of a meeting that was to take place on the next day regarding "the implications of Clear Channel's desire to monetize its stake in Hispanic Broadcasting...". Tichenor's draft letter states that conditioned upon Clear Channel's agreement to certain "bullet points," HBC would shelf register a certain number of shares. To this, Randall Mays scrawls on the memo that he did not like the tone of the draft letter, and copies his fax and the draft letter to "MPM' and "LLM' on April 4. "LLM" is L. Lowry Mays, Clear Channel's CEO, and "MPM' is Mark P. Mays, Clear Channel's COO. It is plain why Tichenor would have provided Randall Mays with a draft letter. He was seeking Clear Channel approval of the letter before it was finalized and officially transmitted. Clear Channel, purportedly a passive HBC investor, through the Randall Mays memo, takes umbrage at HBC's attempt to even suggest the manner in which Clear Channel could monetize its stake in HBC. Significantly, Clear Channel refused the suggestion and instead unilaterally elected to have HBC merge with Univision, thus disregarding the interests of all shareholders in order to benefit Clear Channel, which is not a voting shareholder. See Exhibit 4, especially with regard to the time line from memo to merger. Equally troubling is Exhibit A to Mr. Tichenor's draft letter. It appears to show several radio transactions in which HBC and Clear Channel were cooperating to the exclusion of all other parties.

Clear Channel has never explained why it accounts for its shares in HBC under the equity method of accounting. Accountants and auditors generally use the equity method only when the shareholder (Clear Channel) has the ability to influence the company (HBC) in which it holds shares. The documents show that Clear Channel, which originally held voting shares in Heftel Broadcasting Corporation, accounted for its interest in using the equity method. To avoid attribution when it created the existing HBC, Clear Channel became a non-voting shareholder, but as can be seen from its continued use **of** the equity method to the present day, it has maintained its right to significantly influence HBC. Thus, these newly available depositions and documents further show that Clear Channel exerted significant influence over HBC financial matters in a way wholly inconsistent with its claims of passivity made to the Commission.

The evidence also shows that Clear Channel and HBC have engaged in anticompetitive conduct to limit the access of competitors (such as SBS) to financing and the financial markets, and to limit competitors' ability to acquire stations, thereby injuring competition as well. For example, Randall Mays and Jeffrey Hinson (CFOs of Clear Channel and HBC, respectively) admitted in their

depositions that in the summer of 1999, they called each of the participants in HBC's February 1997 underwriting and demanded that they not participate in SBS' pending initial public offering. As a result, BT Alex Brown withdrew as one of the three co-underwriters and was immediately rewarded with participation in HBC's November 1999 underwriting syndicate. In contrast, Lehman Brothers was penalized for its refusal to withdraw as a co-lead underwriter by being excluded from all of the subsequent offerings of Clear Channel and HBC.² Similarly, Randall Mays and Jeffrey Hinson have succeeded in their attempts over the last four years to limit analyst coverage of SBS.

3. The attached technical exhibit (Exhibit 5) demonstrates that in no less than eleven of the top fifteen Spanish-language markets, Clear Channel's relationship to HBC results in attribution which violates the Commission's permissible limits. The exhibit also shows that within thirteen of the fifteen relevant markets, the four combined companies (Clear Channel, HBC, Univision and Entravision Communications Corp.) own or have attributable interests in more broadcast stations than are permitted under the rules.

In previous filings, as well as in the recent Department of Justice proposed Consent Decree, the Commission has been informed and is aware of the undue influence that Univision has over Entravision. That influence, as well as the Clear Channel relationship to HBC, and the pattern of misrepresentations offered to the Commission by Clear Channel in the past³ raises so many questions concerning the proposed merger, that an evidentiary hearing is the only way to determine whether or not the merger is in the public interest. Does the Commission want to sanction a multi-billion dollar business transaction that will result in wholesale violations of its ownership attribution rules? Does the Commission want to set a dangerous and far reaching precedent by turning a blind eye to its bedrock principle of protecting the public interest? Indeed,

Randall Mays even went so far as to call a Lehman Brothers Managing Director and repeat Hinson's false statement that SBS' CEO was a drug user and/or drug trafficker.

Significant evidence has been submitted to the Commission indicating that Clear Channel is in <u>de facto</u> control of several radio station licensees and to conceal the extent of its control over these entities Clear Channel has made numerous material misrepresentations to the FCC. See, Petition to Deny assignment applications of Secret Communications, Inc. WFCB, Chilicothe, Ohio (Facility ID #52042), File No. BALH-20010918AAP; Chase Radio Partners, LLC, KBRQ, Waco, Texas (Facility ID #60805), and Concord Media Group, Inc. WBGB, Ponta Vedra Beach, Florida (Facility ID #28894), WZNZ (Facility ID #51976), WJGR (Facility ID #29736), WZAZ (Facility ID #68761), Jacksonville, Florida, BALH-20030207 ACC, BAL-20030207 ACE, ADC, ACF.

it is hard to imagine the Commission approving the merger without first establishing an evidentiary record to address the many unanswered questions that have been raised here and in previous filings.

Additionally, it is important to note that the materials here provided to the Commission represent only a small part of the existing documentation demonstrating that the Univision-HBC-Clear Channel-Entravisionnexus requires vigorous evaluation and review. In particular, there are documents presently still under seal in the SBS lawsuit which, it is hoped, the Commission will gain access to in order to comprehend the full scope of wrongdoing by the parties to the pending Univision-HBC merger.

Finally, it is noted that the merger applicants have failed to point to a single merger-specific public interest benefit that would justify a Commission grant and a closing of the transaction without a requisite evidentiary hearing. The parties are not financially distressed, nor are they facing a technological challenge that threatens broadcast service to **any** community of license. In fact, the merger applicants are the undisputed leaders in their respective media with historically consistent double digit growth rates. In this, as in any important proceeding that comes before it, the Commission must carefully weigh the private interests of a corporate combination against the public interest, which the Commission is entrusted to protect. **A** full and complete evidentiary hearing designated to address and answer any and all appropriate issues is the only path to a fair and just determination of the merits of the proposed merger in light of the existing record.

Respectfully submitted,

Arthur Belendiuk

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Attomey for National Hispanic Policy

Bruce A. Eisen

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Enclosure

cc: Chairman Michael Powell

Commissioner Michael Copps Commissioner Kevin Martin Commissioner Jonathan Adelstein Commissioner Kathleen Abemathy

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